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U.S. Bankruptcy Appellate Panel of the Tenth Circuit

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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE JENNIFER NICOL YATES, also known as Jennifer Nicol Norman, also known as Jennifer Nicole Williams, Debtor.	BAP No. WY-05-017
UNIFIED PEOPLE'S FEDERAL CREDIT UNION, Appellant, v. JENNIFER NICOL YATES and MICHAEL DALE YATES, Appellees.	Bankr. No. 04-20069 Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Wyoming

Before NUGENT, THURMAN, and ROMERO[1], Bankruptcy Judges.

ROMERO, Bankruptcy Judge.

United People's Federal Credit Union (the "Credit Union") appeals an order of the United States Bankruptcy Court for the District of Wyoming denying a

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

[1] Honorable Michael E. Romero, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Colorado, sitting by designation.

motion for turnover.[2] For the reasons stated below, the Bankruptcy Court's decision is AFFIRMED.

I. Background

The facts underlying this appeal are not in dispute. On January 12, 2001, the Credit Union entered into a loan agreement with Michael and Jennifer Yates (the "Yates"). Under the loan agreement, the Yates borrowed $7,614.35 and opened an overdraft account, both of which were secured by a 1987 GMC pickup owned by the Yates. Thereafter, the Credit Union extended additional loans to the Yates, secured by the pickup and various other collateral.

On January 9, 2004, as a result of the Yates' delinquent payments, the Credit Union lawfully repossessed certain collateral securing the Yates' loans. On January 16, 2004, the Yates filed for protection under Chapter 13 of the Bankruptcy Code (11 U.S.C. § 101, *et seq.*).[3]

On December 22, 2004, after failing to obtain confirmation of their Chapter 13 plan, and facing motions to dismiss their case filed by both the Credit Union and the Standing Chapter 13 Trustee, the Yates voluntarily converted their case to a case under Chapter 7.[4] On January 11, 2005, the Credit Union filed its Motion for Turnover of Payments Made to Chapter 13 Trustee or in the Alternative, Motion for Order for Exception to Discharge or Dismissal Pursuant to 11 U.S.C. § 707(a) (the "Motion"). The Motion sought 1) dismissal of the case under § 707(a); 2) denial of discharge under § 727(a)(2); or 3) an order pursuant to the Bankruptcy Court's equitable powers under § 105 directing the Standing Chapter

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[2] This case is a companion case to *Unified People's Federal Credit Union v. Yates*, No. WY-05-015 (10th Cir. BAP Sept. 29, 2005).

[3] Unless otherwise specified, all future statutory references in the text are to Title 11 of the United States Code.

[4] The Yates filed their Chapter 13 petition as joint debtors. However, upon conversion to Chapter 7, the case was dismissed as to Mr. Yates because he was not eligible for Chapter 7 relief.

13 Trustee to pay to the Credit Union all plan payments made by the Yates during the course of the Chapter 13 case, totaling approximately $4,820.00.

The Bankruptcy Court held a non-evidentiary telephonic hearing on the Motion on February 3, 2005. Thereafter, on February 11, 2005, the Bankruptcy Court denied the requested relief. In connection with the request for an order requiring the Chapter 13 Trustee to pay any funds on hand from plan payments to the Credit Union, the Bankruptcy Court stated:

> There is no basis in law or fact for this motion. The cash is not property of the estate, but rather belongs to the debtors. 11 U.S.C. §§ 348(f)(1) & 1326(a)(2). The [Credit Union] has no order granting it adequate protection payments during the course of the chapter 13 case, and such an order cannot be entered retroactively.
>
> The [Credit Union] argues the court has the equitable power under § 105 to protect the [Credit Union] and order the funds as compensation. An oft stated rule applies here: the bankruptcy court cannot use its equitable powers to override specific provisions of the Bankruptcy Code. *In re Taylor*, 223 B.R. 747, 754 (9th Cir. BAP 1998). The motion must be denied.[5]

The Credit Union appeals this ruling.

II. Appellate Jurisdiction and Standard of Review

With the consent of the parties, the Bankruptcy Appellate Panel has jurisdiction to hear appeals from final judgments, orders, and decrees of bankruptcy courts within the circuit.[6] Here, the parties did not opt to have this appeal heard by the District Court for the District of Wyoming and thus are deemed to have consented to the Bankruptcy Appellate Panel's jurisdiction.[7]

The Bankruptcy Court's conclusions of law are reviewed *de novo*.[8]

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[5] Order on Motions issued February 11, 2005, by the United States Bankruptcy Court, District of Wyoming at 3, in Appellant's Appendix to Opening Brief at 091.

[6] 28 U.S.C. § 158(a), (b)(1), and (c)(1).

[7] Fed. R. Bankr. P. 8001(e); 10th Cir. BAP L.R. 8001-1.

[8] *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *Lampe v. Williamson (In*

(continued...)

Whether the Bankruptcy Court properly applied §§ 348(f)(1), 1326(a)(2) and 105 to the undisputed facts of this case is an issue of law, and subject to *de novo* review.[9]

III. Discussion

The issues on appeal, as framed by the Credit Union, are as follows:

- Does the Bankruptcy Code allow turnover to creditors of the payments made to the Chapter 13 Trustee upon conversion to Chapter 7; and
- If yes, does § 105(a) give the Bankruptcy Court the authority to order the turnover of those payments to a specific creditor where equity so requires?

Each of these arguments will be addressed in turn.

A. The turnover issue.

The Credit Union argues that payments made to the Chapter 13 trustee in a converted case constitute property of the Chapter 7 estate because § 348(f)(2) provides that in cases converted in bad faith, the property of the converted case includes property of the former Chapter 13 estate as of the date of conversion. The Credit Union cites *In re Siegfried*, 219 B.R. 581 (Bankr. D. Colo. 1998), to support its position. The Credit Union then argues by failing to take evidence on the issue of bad faith, the Bankruptcy Court committed reversible error. We disagree.

The concept of "bad faith" as used in § 348(f)(2) was not raised by the Credit Union prior to the instant appeal. In its brief in support of the Motion, the Credit Union raises "bad faith" as the basis for the requested ***dismissal*** of the

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[8] (...continued)
re Lampe), 331 F.3d 750, 753 (10th Cir. 2003).

[9] *See Stamm v. Morton (In re Stamm)*, 222 F.3d 216, 217 (5th Cir. 2000).

Yates' Chapter 7 case.[10] Specifically, the Credit Union recognized that while the Bankruptcy Code explicitly imposes a good faith requirement in the proposal of Chapter 11, 12 and 13 plans, such a mandate does not exist in Chapter 7 cases.[11] The Credit Union points to the Yates' conduct subsequent to their bankruptcy filing, asserting such conduct demonstrated bad faith *during the pendency* of the Chapter 13 case. The Credit Union then argues that because the Yates could not defend their conduct, pursuant to § 707(a) and § 105, the Yates Chapter 7 case should have been dismissed as a "bad faith" filing.

However, the Credit Union never raised this "bad faith" argument in connection with its turnover Motion. During the telephonic argument on the Motion before the Bankruptcy Court, § 348(f)(2) was not raised.[12] Until the present appeal, the only statutory sections cited by the Credit Union in connection with the requested turnover of the Chapter 13 plan payments were §§ 105, 1306 and 1326.

Now for the first time on appeal, the Credit Union contends the bad faith conduct it previously cited in connection with its dismissal request also is relevant to its turnover request. This attempt to apply this concept in an entirely different fashion must fail because as a general rule, federal appellate courts will not consider an issue not addressed by the trial court. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *International Union of Operating Engineers, Local 953 v. Central National Life Ins. Co.*, 501 F.2d 902, 907 (10th Cir. 1974). *See also Tucker v. R.A. Hanson Co., Inc.*, 956 F.2d 215, 219 (10th Cir. 1992).

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[10] Brief in Support of Motion for Turnover of Payments Made to Chapter 13 Trustee or in the Alternative Motion for Order for Exception to Discharge or Dismissal Pursuant to 11 U.S.C. § 707(a), at 7-8, in Appendix at 80-81.

[11] *Id.* at 7 (citing *Shangraw v. Etcheverry (In re Etcheverry)*, 242 B.R. 503, 505 (D. Colo. 1999)), in Appendix at 80.

[12] *See* Transcript of Recorded Hearing Proceedings, in Appendix at 100-115.

Additionally, the plain language of § 348(f)(2) indicates ***the conversion itself*** must be in bad faith for the section to apply.[13] The evidence of bad faith sought to be offered by the Credit Union applies to the Debtors' pre-conversion conduct, not to the conversion, *per se*. The Credit Union's only allegation with respect to the conversion itself states the Yates announced the conversion just prior to a hearing on confirmation and on the Credit Union's and Chapter 13 Trustee's motions to dismiss. Without more, the timing of the conversion alone does not prove the conversion was in bad faith. *See Warren v. Peterson*, 298 B.R. 322, 327-328 (N.D. Ill. 2003) (using a totality of the circumstances test for bad faith under § 348(f)(2)).

Therefore, even if the Bankruptcy Court had allowed the presentation of the Credit Union's evidence, the Credit Union would not have met the standard required by § 348(f)(2). The Credit Union did not meet the requirements of § 348(f)(2), and nothing in the record supports ordering the Chapter 13 funds to be transferred either to the Credit Union or the Chapter 7 trustee. Accordingly, this Court can find no error on that basis.

B. Use of § 105(a).

Section 105 of the Bankruptcy Code may be used only in instances where there is no clear directive elsewhere in the Code. *See Northwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988). Section 1326(a)(2) specifically directs the Chapter 13 trustee, upon conversion of the case, to return payments to the debtor. There is no language contained in § 1326(a)(2) that indicates the Court could order otherwise. The absence of such language is significant,

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[13] Courts addressing § 348(f)(2) employ the plain meaning of the statute and uniformly connect "bad faith" with conversion, not with other elements of the case. *See, e.g.*, *In re Bell*, 225 F.3d 203, 217 (2d Cir. 2000); *In re Simmons*, 286 B.R. 426, 429 (Bankr. D. Kan. 2002)*; In re Siegfried,* 219 B.R. at 584.

particularly since such a provision occurs in the preceding subsection.[14] It is a basic rule of statutory construction that a statute must be interpreted to mean what it says. *DeMassa v. MacIntyre (In re MacIntyre)*, 74 F.3d 186, 188 (9th Cir. 1996). When particular language is included in one section of a statute but omitted in another section of the same statute, the Court should assume that Congress acted intentionally and purposefully in including or excluding that language. *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991). Because § 1326(a)(2) is clear and unambiguous, § 105(a) cannot be used to alter its effect.

IV. Conclusion

For the above reasons, the Order of the Bankruptcy Court is hereby AFFIRMED.

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[14] Section 1326(a)(1) provides: "Unless the court orders otherwise, the debtor shall commence making the payments proposed by a plan within 30 days after the plan is filed."